

Timothy Carl Aires, Esq. (138169)  
 AIRES LAW FIRM  
 180 Newport Center Drive, Suite 260  
 Newport Beach, California 92660  
 (949) 718-2020  
 (949) 718-2021 FAX

Attorneys for Plaintiff and Counterdefendant,  
 AT&T CORP.

UNITED STATES DISTRICT COURT  
 NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

AT&T CORP.,

Plaintiff,

v.

DATAWAY INC. and dba DATAWAY  
 DESIGNS,

Defendants.

AND RELATED COUNTERCLAIM.

Case No. C07-02440 MMC

OPPOSITION OF PLAINTIFF AND  
 COUNTERDEFENDANT AT&T CORP.  
 TO EX PARTE MOTION OF  
 DEFENDANT AND COUNTER-  
 CLAIMANT DATAWAY INC. FOR  
 ORDER CHANGING TIME FOR  
 HEARING ON MOTION OF  
 DEFENDANT AND COUNTER-  
 CLAIMANT DATAWAY INC. TO  
 STRIKE REPLY OF PLAINTIFF AND  
 COUNTERDEFENDANT AT&T CORP.  
 TO COUNTERCLAIM OF  
 DEFENDANT AND  
 COUNTERCLAIMANT DATAWAY  
 INC.; DECLARATION OF TIMOTHY  
 CARL AIRES

[F.R.C.P., Rule 6]

DATE: August 5, 2008  
 TIME: 9:30 a.m.  
 CTRM: E, 15<sup>th</sup> Floor

Plaintiff and Counterdefendant AT&T Corp. hereby submits its opposition to the ex parte motion of Defendant and Counterclaimant Dataway Inc. for order changing time for hearing on its motion of Counterclaimant Dataway Inc. to strike reply of Counterdefendant AT&T Corp. to Counterclaim of Counterclaimant Dataway Inc., as follows:

///

///



1 summary judgment to raise the pleading defect. These recent proceedings initiated by  
2 Dataway followed.

3  
4 3. DISCUSSION

5  
6 (A) THE UNTIMELY FILING OF A REPLY TO THE COUNTERCLAIM  
7 WITHOUT ENTRY OF DEFAULT IS OF NO LEGAL CONSEQUENCE  
8

9 In their treatise, Judge Schwarzer, Judge Tashima and Attorney Wagstaffe comment  
10 on the default procedure as follows:

11  
12 “Defendant's default (failure to respond) by itself, has no legal  
13 consequence. Until the default is "entered" by the court clerk  
14 (below), defendant can still appear in the action.

15  
16 I.e., if no default has yet been "entered," the clerk must accept  
17 for filing defendant's pleadings or motions although they are  
18 filed late. Once they are filed, it is too late for entry of default  
19 (below), and defendant can proceed with its defense.

20 ...

21 Entry of default is not automatic. Plaintiff must request such  
22 entry and provide the clerk with the required proof of default.”  
23

24 [*Schwarzer, Tashima & Wagstaffe, California Practice Guide: Federal Civil Procedure*  
25 *Before Trial* (2007) “Defaults” ¶¶6:2,7.]  
26

27 The untimely filing of a reply to the counterclaim without entry of default is of no  
28 legal consequence. AT&T's pending motion for summary judgment placed Dataway on

1 notice as to the nature, source and extent of AT&T's denials and defenses to the  
 2 counterclaim. There is no need to expedite the hearing of Dataway's strike motion since  
 3 AT&T's motion for summary judgment served the same purpose as a reply to the  
 4 counterclaim. [*Rashidi v. Albright*, 818 F.Supp. 1354, 1356 (D NV 1993); F.R.C.P., Rule  
 5 56.] The requested relief should be denied.

6  
 7 (B) SHARP PRACTICE SHOULD NOT BE REWARDED OR CONDONED.

8  
 9 In their treatise, Judge Schwarzer, Judge Tashima and Attorney Wagstaffe comment  
 10 on the duty to warn before seeking a default as follows:

11  
 12 "[G]ood practice dictates that plaintiff's counsel notify  
 13 defendant's counsel before requesting default entry. Otherwise,  
 14 the default will almost certainly be set aside by the court,  
 15 resulting in delay and complicating future dealing with  
 16 defendant's counsel."

17  
 18 [*Schwarzer, Tashima & Wagstaffe, California Practice Guide: Federal Civil Procedure*  
 19 *Before Trial* (2007) "Defaults" ¶6:18.]

20  
 21 The Courts of this State have long held that sharp practices in litigation are not to be  
 22 rewarded or condoned. In *Smith v. Los Angeles Bookbinders Union No. 63* (1955) 133  
 23 *Cal.App.2d* 486, the Court noted:

24  
 25 "The law does not favor snap judgments. The policy of the law  
 26 is to have every litigated case tried upon its merits, and it looks  
 27 with disfavor upon a party who, regardless of the merits of his  
 28 case, attempts to take advantage of the mistake, surprise,

1 inadvertence, or neglect of his adversary. Where a party in  
 2 default makes seasonable application to be relieved therefrom,  
 3 and files an affidavit of merits alleging a good defense, and the  
 4 plaintiff files no counter affidavit and makes no showing that he  
 5 has suffered any prejudice or that injustice will result from the  
 6 trial of the case upon its merits, very slight evidence will be  
 7 required to justify a court in setting aside the default. A broad  
 8 discretion is allowed to courts in granting relief, against default,  
 9 and it is in cases only where the lower court has abused its  
 10 discretion that the appellate court will reverse its action." The  
 11 quiet speed of plaintiffs' attorney in seeking a default judgment  
 12 without the knowledge of defendants' counsel is not to be  
 13 commended."

14  
 15 [*Smith v. Los Angeles Bookbinders Union No. 63* (1955) 133 Cal.App.2d 486, 500  
 16 (disapproved on other grounds in *MacLeod v. Tribune Pub. Co., Inc.* (1959) 52 Cal.2d 536,  
 17 551.)]

18  
 19 More recently, sharp practice has been met by our state appellate courts with even  
 20 greater criticism:

21  
 22 We are particularly troubled by the court's remarks  
 23 characterizing the legal profession as "a dog-eat-dog business,"  
 24 "the law of the jungle" and "people . . . cutting each other up."  
 25 If this is, indeed, the modern trend, it should be curtailed so far  
 26 as possible, not rewarded.

27 ...

28 ///

1 "Even legitimate tactics must sometimes yield to the only goal  
 2 that justifies the very existence of our judicial system; i.e., the  
 3 resolution of our citizens' disputes and the administration of  
 4 justice."

5  
 6 *[Brown v. Presley of So. Calif. (1989) 213 Cal.App.3d 612, 620, fn. 3.]*  
 7

8 Dataway should have either notified AT&T's counsel of the pleading error or, at a  
 9 minimum, taken a default which would have placed AT&T on notice of the need to seek  
 10 relief under Rule 55(c).<sup>1</sup> Instead, Dataway sought an unfair advantage in this litigation by  
 11 concealing its knowledge regarding AT&T's failure to timely file a reply until the last  
 12 possible moment. Dataway's conduct is in direct contravention that matters be litigated in  
 13 a manner "to secure the just, speedy, and inexpensive determination of every action ...".  
 14 [F.R.C.P., Rule 1.] Such sharp practice should not be rewarded or condoned. The requested  
 15 relief should be denied.

16  
 17 (C) AT&T'S INTENT TO DEFEND IS PRESENT ON THIS RECORD  
 18

19 No default can be entered if defendant has filed a response indicating its intent to  
 20 defend the action. *[Direct Mail Specialists, Inc. v. Eclat Computerized Technologies, Inc.,*  
 21 *840 F.2d 685, 689 (9th Cir. 1988).]* Even a late-filed responsive pleading (filed after  
 22

---

23  
 24 <sup>1</sup>F.R.C.P., Rule 55(b)(2) requires that notice of default be given, thereby allowing a  
 25 defaulted defendant who has appeared in the action opportunity to show "good cause" why the  
 26 default should be set aside before a default judgment is entered. *[Sea-Land Service, Inc. v.*  
 27 *Ceramica Europa II, Inc., 160 F.3d 849, 852 (1st Cir. 1998) (Purpose of Rule 55(b)(2) notice*  
 28 *requirement "is to permit a party to show cause for its failure to timely appear").]* Failure to  
 give such notice where required is a "serious procedural error" violating due process: "Absent  
 special circumstances, the failure to give necessary notice will require that the default judgment  
 be set aside where attacked on direct appeal or by a motion to vacate the judgment." *[In re*  
*Roxford Foods, Inc., 12 F.3d 875, 881 (9th Cir. 1993).]*

1 expiration of the time allowed by FRCP Rule 12(a)) prevents entry of a default. [*Mitchell v.*  
 2 *Brown & Williamson Tobacco Corp.*, 294 F.3d 1309, 1317 (11th Cir. 2002).] Any motion  
 3 indicating an intent to defend the action bars default, including Rule 56 motions. [*Rashidi*  
 4 *v. Albright*, 818 F.Supp. 1354, 1356 (D NV 1993); *F.R.C.P., Rule 56.*] Indeed, any response  
 5 indicating an intent to defend prevents entry of default. [*See de Antonio v. Solomon*, 42  
 6 *F.R.D.* 320, 322 (D MA 1967) (*Assertion of privilege against self-incrimination.*.)]

7  
 8 In this action over an \$11,534.67 phone bill, the docket, which now contains no less  
 9 than 122 items, clearly and unambiguously indicates an intent on the part of AT&T to defend  
 10 itself against the counterclaim.<sup>2</sup> There is no evidence to the contrary. The requested relief  
 11 should be denied.

12  
 13 (D) NO SHOWING BY DATAWAY OF UNFAIR PREJUDICE

14  
 15 "There is no prejudice to the [counterclaimant] where the setting aside of the default  
 16 has done no harm to [counterclaimant] except to require it to prove its case." [*Lacy v. Sitel*  
 17 *Corp.*, 227 F.3d 290, 293 (5th Cir. 2000); *see also TCI Group Life Ins. Plan v. Knoebber*,  
 18 244 F.3d 691, 701 (9th Cir. 2001).] Defaults are generally disfavored; for it is the policy of  
 19 the law that, wherever possible, cases should be decided on their merits – Any doubts as to  
 20 the propriety of a default are usually resolved against the party seeking default. [*Pena v.*  
 21 *Seguros La Comercial, S.A.*, 770 F.2d 811, 814 (9th Cir. 1985).]

22  
 23  
 24  
 25 <sup>2</sup>Default proceedings protect diligent parties from delay and uncertainty caused by  
 26 unresponsive parties – A default ensures "that litigants who are vigorously pursuing their cases  
 27 are not hindered by those who are not in an environment of limited judicial resources." [*Swaim v.*  
 28 *Moltan Co.*, 73 F.3d 711, 716 (7th Cir. 1996).] There is no evidence on this record that AT&T is  
 not vigorously pursuing its defense. When preparing opposition to the motion for summary  
 judgment, no reasonable reliance could have (or should have) been placed upon the absence from  
 the docket of a reply to the counterclaim given the vigor of this litigation.

At a minimum, the opposition to Dataway's discovery motion and AT&T's pending motion for summary judgment placed Dataway on notice as to the nature, source and extent of AT&T's denials and defenses to the counterclaim. A reply to the counterclaim was filed to cure the pleading error the morning after it was disclosed in Dataway's opposition to AT&T's motion for summary judgment.<sup>3</sup> It is of no small significance that AT&T's reply to the counterclaim does not contain any matter not previously disclosed to Dataway during this action, thereby vitiating any argument of unfair prejudice. Dataway has not even attempted to establish any unfair prejudice.<sup>4</sup> Under all of the circumstances of this action, the compelling interest in seeing that matters be tried and resolved on their merits must triumph.

Dataway should have either notified AT&T's counsel of the pleading error or, at a minimum, taken a default which would have placed AT&T on notice of the need to seek relief under Rule 55(c). Instead, Dataway sought an unfair advantage in this litigation by concealing its knowledge regarding AT&T's failure to timely file a reply until the last

---

<sup>3</sup>Trial courts may refuse to entertain a motion for a default judgment. [*See Chamberlain v. Giampapa*, 210 F.3d 154, 164 (3rd Cir. 2000) (Plaintiff failed to demonstrate any prejudice from Defendant's late answer that contained a litigable defense to the complaint. Also, there was no evidence that defendant's delay in filing an answer was either "willful" or in "bad faith."); *O'Connor v. State of Nevada*, 27 F.3d 357, 364 (9th Cir. 1994); *Draper v. Coombs*, 792 F.2d 915, 924 (9th Cir. 1986) (The answer was technically late but it was submitted on the same day that plaintiff filed the motion for default judgment); *Eitel v. McCool*, 782 F.2d 1470, 1471-1472 (9th Cir. 1986) (The merits of the claim were doubtful, and defendant's failure to answer was excusable neglect in light of ongoing settlement negotiations.); *Educational Serv., Inc. v. Maryland State Board for Higher Education*, 710 F.2d 170, 176 (4th Cir. 1983) (Motion for relief would have to be granted in any event because defendant had appeared in the action and opposed a request for preliminary injunction in which it set forth its defenses.).]

<sup>4</sup>For example, Dataway has not shown that the delay resulted in the loss of evidence, that it increased the difficulty of discovery, or that it thwarted its ability to obtain relief. [*Cutting v. Town of Allentown*, 936 F.2d 18, 22 (1st Cir. 1991) (Plaintiff died in intervening period); *Northwestern Mut. Life Ins. Co. v. DeMalleray*, 789 F.Supp. 651, 654 (SD NY 1992) (Loss of records in interim); *Whelan v. Abell*, 48 F.3d 1247, 1258-1259 (DC Cir. 1995) (Trial completed against other defendants.).]



possible moment. Dataway's conduct is in direct contravention that matters be litigated in a manner "to secure the just, speedy, and inexpensive determination of every action ...". [F.R.C.P., Rule 1.] Such conduct should not be rewarded. The requested relief should be denied.

(E) EVEN A DEFAULT DOES NOT VITIATE THE NEED TO PRESENT ADMISSIBLE EVIDENCE OF DAMAGES; THE AMOUNT OF A DEFAULT JUDGMENT CANNOT EXCEED THE PRAYER.

F.R.C.P., Rule 8(b)(6) provides: "An allegation – other than one relating to the amount of damages – is admitted if a responsive pleading is required and the allegation is not denied." However, only upon default will the factual allegations of the complaint, except those relating to the amount of damages, be taken as true. [*TeleVideo Systems, Inc. v. Heidenthal*, 826 F.2d 915, 917 (9th Cir. 1987).]<sup>5</sup> Evidence of damages is required where the claim is for an unliquidated amount or for punitive damages. [F.R.C.P., Rule 55(b)(2).] The allegations of the complaint as to amount of damages suffered are not controlling, but the judgment may not exceed the prayer. [*Dundee Cement Co. v. Howard Pipe & Concrete Prods., Inc.*, 722 F.2d 1319, 1323-1324 (7th Cir. 1983).]

Here, the prayer of Dataway's counterclaim is silent as to a specified amount of damages allegedly suffered. Hence, even assuming AT&T is "in default", Dataway cannot obtain a "default judgment" in any amount! Striking AT&T's reply would serve absolutely no purpose since an amendment to the Counterclaim would be required before any monetary

///

---

<sup>5</sup>Although well-pleaded allegations in the complaint are admitted by defendant's failure to respond, "necessary facts not contained in the pleadings, and claims which are legally insufficient, are not established by default." [*Cripps v. Life Ins. Co. of No. America*, 980 F.2d 1261, 1267 (9th Cir. 1992).]

1 relief could be granted on a default basis, and the amendment would open the default, thereby  
2 allowing AT&T an opportunity to file a reply to the amended Counterclaim.

3  
4 These recent proceedings initiated by Dataway are in direct contravention that matters  
5 be litigated in a manner "to secure the just, speedy, and inexpensive determination of every  
6 action ...". [F.R.C.P., Rule 1.] Such conduct should not be rewarded. The requested relief  
7 should be denied.

8  
9 4. CONCLUSION

10  
11 For the foregoing reasons, the ex parte motion of Defendant and Counterclaimant  
12 Dataway Inc. for order changing time for hearing on its motion of Counterclaimant Dataway  
13 Inc. to strike reply of Counterdefendant AT&T Corp. to Counterclaim of Counterclaimant  
14 Dataway Inc. should be denied.

15  
16 DATED: July 25, 2008

AIRES LAW FIRM

17  
18 By: 

19 Timothy Carl Aires, Esq.  
20 Attorney for Plaintiff and Counterdefendant,  
21 AT&T CORP